

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CADDELL CONSTRUCTION CO.
(DE), LLC**

2700 Lagoon Park Dr.
Montgomery, AL 36109-1110

Plaintiff,

v.

THE DEPARTMENT OF THE NAVY

1000 Navy Pentagon
Washington, DC 20350-1000

Defendant.

Civil Action No.: 1:19-cv-2967

COMPLAINT

Plaintiff, Caddell Construction Co. (DE), LLC (“Caddell” or “Plaintiff”), by and through its undersigned counsel, brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* to compel Defendant, the Department of the Navy (“Defendant”) to produce non-exempt records responsive to Caddell’s FOIA request and, in support thereof, states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to FOIA, 5 U.S.C § 552(a)(4)(B). This Court also has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331.

2. This Court has authority to grant injunctive relief pursuant to FOIA, 5 U.S.C § 552(a)(4)(B).

3. This Court has authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

4. Venue is proper under FOIA, 5 U.S.C § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

5. Caddell has exhausted all administrative remedies and otherwise satisfied all conditions precedent necessary to bring this action.

PARTIES

6. Caddell is a limited liability company formed under the laws of the State of Delaware with its principal place of business located at 2700 Lagoon Park Drive, Montgomery, AL 36109-110.

7. Defendant is an agency of the United States Government and is headquartered at 1000 Navy Pentagon, Washington DC 20350-1000.

STATEMENT OF FACTS

8. On or about January 10, 2014, Caddell and Naval Facilities Command Southeast (“NAVFAC”), acting on behalf of Defendant, entered into Contract No. N69450-14-C-1756 (the “Contract”) for the construction of the Nuclear Power Training Facilities, Naval Weapons Station, located in Charleston, South Carolina (the “Project”).

9. In 2018, NAVFAC sought to de-scope a portion of Caddell’s scope of work under the Contract known as Building 2314. Through Request for Proposal (“RFP”) 198, NAVFAC requested Caddell provide a proposal for the value of the credit back to NAVFAC for deletion of Building 2314. Caddell provided a detailed proposal in response to NAVFAC’s RFP for the value of the credit to be provided back to NAVFAC for the deletion of Building 2314 from Caddell’s scope.

10. NAVFAC rejected Caddell’s proposal and, instead, unilaterally issued Contract Modification P00004 (“Mod P00004”), effective February 5, 2019, reducing the Contract’s value

by \$6,087,683.20. (*See* Exhibit “A”). NAVFAC did not provide Caddell a calculation, breakdown, detailed explanation, or any support for its unilateral final determination regarding the value of the credit to be provided back to NAVFAC for the deletion of Building 2314 from Caddell’s scope.

11. Through project communications, Caddell requested NAVFAC provide documents in support of its unilateral final decision but NAVFAC refused to do so. Therefore, Caddell sought to obtain the supporting documentation related to NAVFAC’s unilateral final decision under FOIA.

12. On or about April 11, 2019, Caddell requested, through the Department of the Navy’s online FOIA application portal and pursuant to FOIA, copies of the following four categories of documents:

- a. All documents and communications, whether originally in hardcopy or electronic format, related to Contract Modification P00004 and RFP-198, including but not limited to any analyses, reports, minutes of meetings, and correspondence of any kind (including emails, memos, letters, reports, etc.), pertaining to the total funded amount shown in Modification P00004.
- b. All documents and communications which may have been relied upon or considered by anyone associated with, working on behalf of, and/or reporting to NAVFAC pertaining to the consideration, development, execution, and/or issuance of Modification P00004.
- c. All documents and communications that NAVFAC considered or relied upon in determining the total amount of Mod P00004.
- d. All documents and communications related to the pricing and scope of any re-procurement or rebidding of the modifications/renovations associated with existing

Building 2314 and the issuance of a new solicitation and contract, if applicable, for this work.

(*See* Exhibit “B”).

13. On or about August 2, 2019, Defendant responded to Caddell’s FOIA request (No. DON-NAVY-2019-005755/FY19-0020) with an adverse determination claiming that the documents sought by Caddell were “entirely exempt from disclosure under FOIA Exemption 5 (5 U.S.C. §552(b)(5)).” (*See* Exhibit “C”). In support of its adverse determination, Defendant noted that the “subject contract remains open” and “[t]he documents will be used for Government deliberations on future decisions under the contract.”

14. However, the documents sought by Caddell’s FOIA request: (1) relate solely to the deletion of Building 2314 from Caddell’s scope of work and are not related to any other request for equitable adjustment or claim by Caddell under the Contract; and (2) contain factual information that does not fall within the protections of FOIA Exemption 5.

15. On or about August 14, 2019, Caddell timely submitted its appeal of Defendant’s adverse determination on Caddell’s FOIA request. (*See* Exhibit “D”).

16. Pursuant to FOIA, 5 U.S.C § 552(a)(6)(A)(ii), Defendant was required to make a determination with respect to Caddell’s appeal within twenty (20) business days of receipt, or by September 12, 2019, and, if the denial of the request was upheld, notify Caddell of the provisions of judicial review for that determination.

17. On September 13, 2019, Defendant responded to Caddell’s appeal of Defendant’s adverse determination on Caddell’s FOIA request by producing seven (7) documents consisting of approximately 80 pages in response to the fourth category of documents requested by Caddell (*see* ¶ 12(d) above). (*See* Exhibit “E”).

18. In its response to Caddell's appeal, Defendant did not provide a determination regarding the three other categories of documents requested by Caddell (*see* ¶ 12(a), (b), and (c) above) nor provide a complete determination regarding the fourth category of documents requested (*i.e.* notify Caddell of whether its production of 80 pages in response to the fourth category of documents requested constituted a full production of responsive documents or if some documents were still being withheld).

19. Instead, Defendant notified Caddell that it was submitting its "package to the Office of General Counsel for review." (*See* Exhibit "E").

20. Defendant did not set forth any "unusual circumstances" (as defined by FOIA, § 552(a)(6)(B)) or otherwise provide Caddell any explanation for its failure to timely provide a determination regarding Caddell's appeal.

21. While not requested, Caddell offered, in good faith, to extend the time for Defendant to provide a complete determination on Caddell's appeal to September 23, 2019. Defendant did not acknowledge or comment on this offer.

22. On September 19, 2019, Defendant, through counsel, claimed to "close" Caddell's appeal and "remand" it to the IDA, NAVFAC, for reconsideration. (*See* Exhibit "F").

23. On September 20, 2019, in response to Caddell's appeal, Defendant produced three additional documents, which were heavily redacted, and issued another adverse determination upholding Defendant's prior denial of Caddell's FOIA request and parroting nearly word-for-word its prior denial. (*See* Exhibit "G").

24. In this second adverse determination to Caddell's appeal, Defendant improperly attempted to restart the appeal process and associated statutory timeframes set out by FOIA applicable to Caddell's FOIA request. Specifically, instead of notifying Caddell of its right to seek

judicial review of Defendant's adverse determination on Caddell's appeal, as Defendant is required to do under FOIA, 5 U.S.C. § 552(a)(6)(A)(ii), Defendant attempted to direct Caddell to again appeal Defendant's second adverse determination regarding Caddell's appeal, a process neither required nor contemplated by FOIA.

25. On September 23, 2019, Caddell objected to Defendant's second adverse determination and improper attempt to circumvent Caddell's right to seek judicial review of Defendant's adverse determination but offered, in good faith, to further extend the time for Defendant to respond to Caddell's appeal to October 1, 2019. Defendant did not respond to this offer, and has not responded to date. Caddell has exhausted the administrative remedies available to it on this FOIA request and appeal.

26. As of the date of filing this Complaint, Defendant has not provided further documentation or information in response to Caddell's FOIA request and appeal and has not modified its adverse determinations regarding Caddell's FOIA request and Caddell's subsequent appeal thereof.

COUNT I
(Failure to Produce Responsive Records)

27. Plaintiff re-alleges and incorporates paragraphs 1 through 26 as if fully stated herein.

28. Defendant is an "agency" within the meaning of 5 U.S.C. § 551(1).

29. The records requested by Caddell's FOIA request are "agency records" within the meaning of FOIA and Defendant has possession, custody, and control of the records requested.

30. Defendant has failed to make reasonable efforts to search for records responsive to Caddell's FOIA request, in violation of Caddell's rights under FOIA.

31. Defendant has failed to disclose and produce all non-exempt records, or portions thereof, responsive to Caddell's FOIA request in violation of Caddell's rights to those records under FOIA.

32. Defendant has failed to reasonably segregate non-exempt portions of documents responsive to Caddell's FOIA request from those portions subject to an exemption.

33. Defendant has failed to demonstrate that any of the records responsive to Caddell's FOIA request are exempt from production.

34. The records sought by Caddell under its FOIA request are not exempt from production under Exemption 5 of FOIA or any other exemption. Specifically, the records sought by Caddell's under its FOIA request are:

- a. post-decisional, not pre-decisional, in nature; and/or
- b. factual, not deliberative, in nature; and
- c. not normally privileged in the civil discovery context.

35. Defendant is improperly withholding agency records requested by Plaintiff pursuant to FOIA.

36. Caddell is being harmed by Defendant's improper withholding of the requested records in violation of Caddell's rights under FOIA, and will continue to be harmed unless Defendant is compelled to produce to Caddell all non-exempt records, or portions thereof, responsive to Caddell's FOIA request.

37. Caddell is entitled to its reasonable attorneys' fees and costs pursuant to FOIA, 5 U.S.C § 552(a)(4)(E).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Caddell, respectfully requests that this Court:

(a) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Caddell's FOIA request;

(b) order Defendant to produce, by a date certain, any and all non-exempt records responsive to Caddell's FOIA request and a *Vaughan* Index of any responsive records withheld under claim of exemption;

(c) grant Caddell an award of attorneys' fees and costs reasonably incurred in this action; and

(d) grant such other relief as this Court deems just and proper.

SUBMITTED this 2nd day of October 2019.

Respectfully submitted,

SMITH, CURRIE & HANCOCK LLP

/s/ *Brian Krulick*

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